

NOTICE

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2014 IL App (4th) 130831-U

NO. 4-13-0831

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

April 11, 2014

Carla Bender

4th District Appellate

Court, IL

In re: MARRIAGE OF)	Appeal from
CRAIG P. RUSSO,)	Circuit Court of
Petitioner-Appellee,)	Sangamon County
and)	No. 10D806
MARINA K. RUSSO,)	
Respondent-Appellant.)	Honorable
)	Brian Otwell,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justice Pope concurred in the judgment.
Presiding Justice Appleton dissented.

ORDER

¶ 1 *Held:* The ex-husband failed to show by clear and convincing evidence the "bonuses" he received as a result of his ownership interest in his employer were not attributable to his personal effort.

¶ 2 In October 2010, petitioner, Craig P. Russo, filed a petition for dissolution of marriage, naming his now ex-wife, Marina K. Russo, as respondent. Following an October 2012 hearing on the contested issues, the trial court entered a supplemental judgment of dissolution. The supplemental judgment incorporated by reference the court's previously filed memorandum of opinion, which determined the entire balance of a Chase savings account was Craig's nonmarital property. Marina appealed, arguing the court erred by classifying the balance in the savings account as nonmarital property. We reverse and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In September 2003, Craig and Marina married in New York. Prior to their marriage, the parties had a child, Adrian (born July 27, 2002). In October 2010, Craig filed his petition for dissolution of marriage. In December 2010, Craig and Marina separated.

¶ 5 The parties were both physicians. In 1999, Craig started working for Clinical Radiologists, S.C. (Clinical Radiologists), of Springfield, Illinois. In February 2002, Craig entered into an employment agreement with Clinical Radiologists. Craig's employment agreement stated, in pertinent part:

"Section 5. Compensation. Corporation shall pay to Doctor and Doctor agrees to accept as full compensation for the performance of all services which Doctor renders on behalf of Corporation that compensation determined by the Board of Directors in the exercise of its sole discretion from time to time.

Even though Corporation shall be advancing sums of money to Doctor and characterizing the same as salary or bonuses, these advances are premised on Corporation's assumption that Doctor shall have satisfied the criteria set by the Board of Directors from time to time as a condition to earning as compensation the payments that Doctor receives. If Doctor does not satisfy the criteria, then that portion of the sums which Doctor receives that does not satisfy the criteria will be unearned, will not constitute compensation and will constitute an advance to Doctor from Corporation ('Advance(s)'). Doctor acknowledges and agrees that each time he cashes a corporate check for compensation for a

period when the criteria set by the Board of Directors is not satisfied, the portion of the sum set forth in the check reflecting the unsatisfied portion of the criteria will constitute such an Advance. Doctor acknowledges and agrees that Corporation has the right to offset such Advances against any compensation to which Doctor may otherwise be entitled in the future and further acknowledges and agrees that if the offset does not fully discharge the Advance(s) made by Corporation to him, the remaining portion of the Advance(s) shall survive the offset and shall continue to be a valid indebtedness from Doctor to Corporation. Doctor shall be obligated to discharge such indebtedness by paying Corporation within twenty (20) business days of receipt from Corporation of a statement expressing the amount of the indebtedness."

¶ 6 The same day, Craig entered into a stock purchase agreement with Clinical Radiologists. The agreement provided Craig would receive 10,635 shares of Clinical Radiologists stock in exchange for a purchase price of \$20,631.90. By the terms of the agreement, Craig acquired the stock "for investment purposes only, not with a view to the sale or distribution of all or any part thereof and without any present intention of selling or otherwise distributing the same at any particular time or upon the occurrence or non-occurrence of some predetermined event."

¶ 7 In October 2012, the trial court held a hearing to establish grounds for dissolution and resolve the contested issues in the case. At the hearing, Craig testified about the compensation he received from Clinical Radiologists. Craig explained he receives a monthly

"base draw" in the amount of \$25,000. To receive this base draw, Craig must meet or exceed "the bar," which is the minimum number of "work units" set by the board of directors. If Craig exceeds the bar, he receives what is called "unit pay," which is compensation for the "units" he works over the minimum. Craig typically receives a quarterly "bonus" in addition to his base draw and unit pay.

¶ 8 Craig then explained how the bonuses are paid by Clinical Radiologists. The board of directors tries to schedule a regular quarterly bonus, which is approximately \$20,000 or \$30,000 to each shareholder. The bonuses consist of the "additional monies that the corporation has after expenses are paid, after base salaries are paid, [and] after unit settlements are paid." Generally, the fourth quarter bonus is "considerably" higher than the regular quarterly bonus. Craig further explained the company pays out all its income to shareholders in the form of these bonuses. Clinical Radiologists pays these bonuses only to shareholders. A physician can work for Clinical Radiologists and earn the base draw and unit pay without receiving the bonus pay. To be eligible to become a shareholder, a person must work for Clinical Radiologists for three years.

¶ 9 Craig receives his base draw, unit pay, and bonuses in one lump sum from Clinical Radiologists. Craig's entire compensation is listed as wages and salary on Craig's W-2 statement and is directly deposited into a checking account at Chase Bank. Craig receives a statement from Clinical Radiologists designating the compensation received as base pay, unit pay, or bonus pay. After the parties separated, Craig began transferring the portion of his pay designated as a bonus from his checking account into a Chase savings account (hereinafter the Chase account). Craig opened the Chase account after the parties separated. Craig further

testified the balance of the Chase account consists of money associated with his stock ownership in Clinical Radiologists.

¶ 10 After the October 2012 hearing, the parties submitted written arguments to the trial court. Craig argued the bonus pay he receives is nonmarital property because he receives the bonuses as a result of his stock ownership in Clinical Radiologists, an interest he acquired prior to the marriage, and not through his work as a physician. Craig relied on the fact stock ownership in Clinical Radiologists was a prerequisite to receiving the bonus pay. In other words, a physician could work for Clinical Radiologists and earn base and unit pay without receiving the bonus pay. In her written submission, Marina did not include any argument regarding the bonuses Craig receives or the classification of the funds in the Chase account. (We note here Marina's written argument identifies the Chase account as an asset "in dispute as to either status, value or both." It appears, then, counsel for Marina identified the issue but omitted argument regarding the bonuses and the Chase account.)

¶ 11 In December 2012, the trial court entered its judgment of dissolution. The judgment dissolved the marriage and established joint custody of Adrian. The judgment reserved the remaining issues for further determination of the court. In June 2013, the trial court issued its memorandum of opinion, which resolved the remaining issues. The court's memorandum of opinion provides, in pertinent part:

"14. One of the most significant differences in the parties' positions has to do with [the Chase account] balance of \$348,771.00. The evidence was that Craig had deposited 'bonuses' in the form of distributions of profit from the stock he acquired in Clinical Radiologists prior to the marriage. Marina views this

account as marital property, but advances no argument or authority to support that classification. Since the deposits to this account were derived from non-marital property and were passive income (not directly related to fees generated by Craig's work), the Court finds such to be non-marital. *In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 850 N.E.2d 880 (3d Dist. 2006)[;] see also *In re Marriage of Dann*, 2012 IL App (2d) 100343, 973 N.E.2d 498 (2d Dist. 2012)[,] and discussion therein."

¶ 12 In July 2013, Marina filed a motion to reconsider, arguing the trial court improperly classified as nonmarital property the balance contained in the Chase account. Specifically, Marina argued the bonuses were earned from Craig's employment with Clinical Radiologists. Marina took issue with the court's classification of the bonuses as passive income, stating Craig's employment agreement classified the bonuses as active income. Further, Marina contended because Craig's bonuses were included in his W-2 and his adjusted gross income on his tax returns, and not in the ordinary dividend portion of his tax returns, the court erred in concluding the balance of the Chase account was nonmarital property. Marina's motion also noted the court had not entered a judgment of dissolution incorporating its June 2013 memorandum of opinion.

¶ 13 The trial court thereafter ordered Craig's attorney to prepare a supplemental judgment of dissolution consistent with the court's June 2013 memorandum of opinion. The court set the matter for an August 8, 2013, hearing at which it would enter the supplemental judgment and schedule the cause for hearing on Marina's motion to reconsider and any response

or cross-motion filed by Craig. At the hearing, the court entered the supplemental judgment and set the hearing on Marina's motion to reconsider for August 26, 2013.

¶ 14 Craig thereafter filed a motion to reconsider and also sought clarification of the supplemental judgment. Specifically, Craig sought a ruling on the issues of (1) Adrian's health insurance; (2) the services of Adrian's part-time caregiver, Hilda; and (3) payment for Adrian's extracurricular activities, none of which were addressed in the trial court's memorandum of opinion. Following the August 2013 hearing, the court ordered Craig to maintain health insurance coverage for Adrian and any of Adrian's medical expenses not covered by insurance would be split equally between the parties. Further, the court directed Craig to shoulder the cost of Adrian's extracurricular activities. The court declined to rule on the issue of Hilda and directed the parties to resolve the issue. Finally, the court denied Marina's motion to reconsider.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, Marina contends the trial court erred by classifying as nonmarital property the Chase account, into which Craig deposited the bonuses he received as a result of his shareholder interest in Clinical Radiologists.

¶ 18 A. Standard of Review

¶ 19 The parties disagree as to the applicable standard of review. Craig argues this court should employ the manifest-weight-of-the-evidence standard of review, citing the general rule a trial court's classification of property as marital or nonmarital will not be disturbed on appeal unless the court's classification was against the manifest weight of the evidence. See *Samardzija*, 365 Ill. App. 3d at 706, 850 N.E.2d at 884. Marina argues we must review the issue *de novo*, citing *In re Marriage of Wendt*, 2013 IL App (1st) 123261, ¶ 15, 995 N.E.2d 439, which

held where no dispute exists as to the facts or credibility of the witnesses, *de novo* review of the trial court's classification of property as marital or nonmarital is appropriate. We agree with Marina.

¶ 20 In this case, the facts are not disputed. Further, the trial court was not required to weigh conflicting evidence or the credibility of witnesses—the entirety of the evidence regarding the bonuses and the Chase account was presented by Craig. Rather, the parties' dispute centers on the legal effect of settled facts. We will review *de novo* the trial court's classification of the balance in the Chase account as nonmarital property. *In re Marriage of Peters*, 326 Ill. App. 3d 364, 366, 760 N.E.2d 586, 588 (2001).

¶ 21 B. The Merits

¶ 22 Section 503 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/503 (West 2012)) governs the classification of property into two categories—marital and nonmarital property. Section 503(a) provides, in pertinent part, as follows:

"(a) For purposes of this Act, 'marital property' means all property acquired by either spouse subsequent to the marriage, except the following, which is known as 'non-marital property':

* * *

(6) property acquired before the marriage;

(8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection *if the income is not attributable to the personal effort of a*

spouse." (Emphasis added.) 750 ILCS 5/503(a) (West 2012).

Section 503(b)(1) of the Dissolution Act creates a presumption all property acquired after marriage and before dissolution of marriage is marital property. 750 ILCS 5/503(b)(1) (West 2012). To overcome this presumption, a party seeking to have property classified as nonmarital must show by clear and convincing evidence the property falls within one of the exceptions in section 503(a). *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017, 909 N.E.2d 221, 228 (2009). "The party claiming that the property is nonmarital has the burden of proof, and any doubts as to the nature of the property are resolved in favor of finding that the property is marital." *Id.*

¶ 23 In this case, the parties agree Craig's stock in Clinical Radiologists is Craig's nonmarital property because it was acquired before the marriage. See 750 ILCS 5/503(a)(6) (West 2012). The parties' dispute rests on whether the income derived from Craig's stock ownership—received in the form of bonuses—is "attributable to the personal effort" of Craig. If the bonuses are attributable to Craig's personal effort, the balance of the Chase account containing Craig's bonus pay is marital property. 750 ILCS 5/503(a)(8) (West 2012).

¶ 24 Marina argues Craig had the burden to prove the bonus income from Clinical Radiologists is also nonmarital income. She contends Craig failed to meet his burden of proving by clear and convincing evidence the balance in the Chase account, which was funded by Craig's bonuses, was not attributable to his personal efforts. Marina characterizes Craig's testimony as "limited" and states it "fails to answer several questions regarding any connection between the bonuses and his personal efforts." We agree.

¶ 25 In this case, Craig presented the only testimony regarding the bonuses he received and the Chase account. Craig testified Clinical Radiologists pays these bonuses out of the monies that remain following payment of expenses and settlement of accounts. Clinical Radiologists pays these bonuses only to shareholders. Physicians can work for Clinical Radiologists and receive the base and unit pay without receiving the bonuses. On this evidence, we are not convinced the bonuses received by Craig were not attributable to his personal effort. In other words, Craig failed to show by clear and convincing evidence the bonuses were not attributable to his personal effort—a burden he carried throughout the proceedings. See *Schmitt*, 391 Ill. App. 3d at 1017, 909 N.E.2d at 228; *Dann*, 2012 IL App (2d) 100343, ¶ 86, 973 N.E.2d 498 (The trial court improperly granted summary judgment where the record before the court contained no evidence to rebut the presumption the income was attributable to the personal effort of the spouse. The only evidence on the issue before the court was (1) the husband's and company accountant's averments that the company made payments for the husband's purchase of stock, and (2) the husband's deposition testimony the funds he received from the company to purchase the stock were "distributions" from the company.).

¶ 26 In this case, several important questions regarding the bonuses and the Chase account were neither asked nor answered. For instance, if Clinical Radiologists terminated Craig's employment, would he be allowed to maintain his shareholder status or would he have to sell his stock back to Clinical Radiologists? If Craig could keep his ownership interest upon termination, would he still be entitled to receive bonuses without performing work for the corporation? Further, is Craig entitled to these bonuses if he does not meet or exceed the minimum number of work units? Is the amount of the bonus a shareholder physician receives determined by the amount of work he or she performs for Clinical Radiologists? Craig's

testimony provides no answers for these questions. The February 2002 employment and stock purchase agreements provide no answer. Consequently, we are left doubting whether the Chase account was properly classified as nonmarital property. See *Schmitt*, 391 Ill. App. 3d at 1017, 909 N.E.2d at 228 ("any doubts as to the nature of the property are resolved in favor of finding that the property is marital").

¶ 27 Craig suggests his compensation is separate and distinct from the bonuses he receives from Clinical Radiologists, relying on language in the February 2002 stock purchase agreement, which provides Craig acquired the stock "for investment purposes only." We find no support for Craig's argument in the stock purchase agreement, the effect of which is to limit the transferability of the stock.

¶ 28 Craig relies on *Samardzija* to support his position the balance of the Chase account was nonmarital property. Craig's reliance is misplaced. In *Samardzija*, 365 Ill. App. 3d at 704, 850 N.E.2d at 883, the petitioner was the president of Grempe Steel Company, a business owned by his family. The petitioner had received a 25% shareholder interest in the company from his parents prior to his marriage to the respondent. *Id.* The company regularly paid its shareholders " 'profit bonuses.' " *Id.* The company's accountant testified the petitioner received the bonuses "because he was a stockholder, not because of his employment." *Id.* At some point during the parties' marriage, the company loaned the petitioner \$112,000 for use in building the parties' marital home. *Id.* The petitioner repaid the loan by returning the bonuses he received from the company. *Id.*

¶ 29 On appeal, the respondent argued the profit bonuses which the petitioner returned to the company "were a marital asset which should have been included in the division of marital property." *Id.* at 707, 850 N.E.2d at 885. The Third District held the trial court properly

classified the profit bonuses as the petitioner's nonmarital property. *Id.* In making its determination, the appellate court found dispositive the testimony of the company's accountant, who testified "the bonuses were only given to stockholders *and were not based on employment.*" (Emphasis added.) *Id.*

¶ 30 Here, Craig presented testimony only on the point of whether the bonuses were given only to shareholders. Craig presented no evidence his receipt of these bonuses was not predicated on his employment with the company. We decline to apply *Samardzija*.

¶ 31 Because Craig failed to produce sufficient evidence to overcome the presumption the Chase account is marital property, we reverse the trial court's judgment classifying the Chase account as nonmarital property. On remand, the court shall equitably divide the balance of the Chase account based on the evidence already presented.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we reverse the trial court's judgment and remand the cause for further proceedings consistent with this order.

¶ 34 Reversed and remanded with directions.

¶ 35 JUSTICE APPLETON, dissenting.

¶ 36 I respectfully dissent. I would find that the inept nomenclature used by the Clinical Radiologists is not determinative of the nature of the professional corporation. As a shareholder of the corporation, Craig receives dividends from it based on the net profits of the corporation. Calling a dividend a "bonus" does not change the nature of the corporate form of the business. Because the petitioner acquired his ownership interest prior to the marriage, it is his nonmarital property. Putting a pretty necktie on a hog does not transform a pig into a person.